

In the Privy Council.

No. 37 of 1937.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO *Appellant*

AND

THE CORPORATION OF THE TOWNSHIP OF YORK *Respondent*

AND

THE ATTORNEY-GENERAL OF CANADA AND THE
ATTORNEY-GENERAL OF ONTARIO - *Interveners.*

CASE
OF THE ATTORNEY-GENERAL OF CANADA.

RECORD

1. This is an appeal by special leave from a judgment of the Court of Appeal for Ontario dated the 4th December, 1936 which decided that the Ontario Municipal Board had power to make an order dated the 23rd September, 1936 requiring the appellant to make discovery on oath of documents relating to any matter in question on the respondent's application to the Board to reduce the contractual rate at which the appellant was supplying the respondent with water, and further authorising the respondent to enter on and inspect the appellant's water works system and further ordering the appellant's commissioner of works to appear before a special
10 examiner to be examined *vivâ voce* on oath.
2. The appellant had agreed by a contract dated the 18th July, 1916 to supply the respondent with water for which the respondent agreed to pay 20 cents for each 1,000 gallons, subject to variation by agreement or by arbitration in accordance with clauses 23 and 24 of the contract. Statutory effect was given to the contract by the Township of York Act, being chapter 98 of the Statutes of Ontario, 1917, which in schedule "A" sets out a copy of the contract.

p. 14.
pp. 8-9.
pp. 5-6.
p. 9, ll. 4-9.
p. 9,
ll. 10-16.
p. 16, ll. 3-4.
p. 16,
ll. 5-16.

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p. 16,
ll. 20-34.

3. By section 2 of the Township of York Act, being chapter 88 of the Statutes of Ontario, 1936, the legislature of Ontario purported to authorise either the appellant or the respondent to apply to the Ontario Municipal Board to vary the rates to be charged for water supplied under the contract or in any matters relating or arising out of the contract, any decision of the Board to be final and conclusive and not subject to appeal.

4. The Ontario Municipal Board was established as the Ontario Railway and Municipal Board by the Ontario Railway and Municipal Board Act, 1913 being chapter 37 of 3 & 4 Geo. 5, and at the material time was governed by the Ontario Municipal Board Act, 1932, being chapter 27 of the Statutes of Ontario, 1932. The Board consists of three members appointed by the Lieutenant-Governor in Council (section 8) and holding office during pleasure save that the chairman, if at the time of his appointment a barrister of at least ten years' standing, is removable only upon address of the Assembly (section 10). The chairman's opinion on any question of law prevails (section 16). When sittings are to be held in a municipality where a court house is situate the Board has the same authority and right as a judge of the Supreme Court with respect to the use of the court house and other buildings and apartments set aside in the municipality for the administration of justice (section 27). The Board for the purposes of the Act has all the powers of a court of record and an official seal, to be judicially noticed, (section 41) and has exclusive jurisdiction in all matters within its jurisdiction, with authority to hear and determine all questions of law and fact (sections 43 and 42), and wide general powers including the issue of mandatory or prohibitory injunctions (sections 44 and 54). Orders, decisions and regulations of the Board are subject to variation or rescission by the Lieutenant-Governor in Council (section 156). An appeal lies upon any point of jurisdiction or law to the Court of Appeal, which may draw inferences not inconsistent with facts expressly found by the Board; and a further restricted right of appeal to His Majesty in Council is provided (section 157). The fees on orders of the Board are payable by law stamps (section 161). The following provisions of the Act are set out in full :

“ 45. The Board for the due exercise of its jurisdiction and
“ powers and otherwise for carrying into effect the provisions of
“ this or any other general or special Act, shall have all such powers,
“ rights and privileges as are vested in the Supreme Court with
“ respect to the amendment of proceedings, addition or substitution
“ of parties, attendance and examination of witnesses, production
“ and inspection of documents entry on and inspection of property;
“ enforcement of its orders and all other matters necessary or
“ proper therefor. R.S.O. 1927, c. 225, s. 20 (4) varied. 40
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“ 59. The Board, inspecting engineer, or person appointed
“ under this Act to make any inquiry or report may,—

“ (a) enter upon and inspect any place, building, or works,
“ being the property or under the control of any company,

“ the entry or inspection of which appears to it or him requisite;

“ (b) inspect any works, structure, rolling stock or property of the company;

“ (c) require the attendance of all such persons as it or he thinks fit to summon, and examine and require answers or returns to such enquiries as it or he thinks fit to make;

10 “ (d) require the production of all books, papers, plans, specifications, drawings and documents, relating to any matter before it or him;

“ (e) administer oaths,

“ and shall have the like power to summon witnesses and enforce their attendance, and compel them to give evidence and to produce books, papers or things which they are required to produce, as is vested in any court in civil cases. R.S.O. 1927, c. 225, s. 52.

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20 “ 140. Sheriffs, deputy sheriffs, constables and other peace officers shall aid, assist and obey the board in the exercise of the jurisdiction conferred by this Act whenever required so to do, and shall, upon the certificate of the secretary, be paid by the county interested the like fees as for similar services at the sittings of the Supreme Court for the trial of actions, and such fees shall be charged as expenses of the administration of justice.

“ R.S.O. 1927, c. 225, s. 30.

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30 “ 147.—(1) A certified copy of any order or decision made by the Board under this Act or any general or special Act may be filed in the office of the Registrar of the Supreme Court, and shall thereupon become and be enforceable as a judgment or order of the Supreme Court to the same effect, but the order or decision may be nevertheless rescinded or varied by the Board.

“ (2) It shall be optional with the Board to adopt the method provided by this section for enforcing its orders or decisions or to enforce them by its own action. R.S.O. 1927, c. 225, s. 37.

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“ 152. The Board may make general rules regulating its practice and procedure. R.S.O. 1927, c. 225, s. 42.

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40 “ 154.—(1) In determining any question of fact the Board shall not be concluded by the finding or judgment of any other court in any action, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be *prima facie* evidence only.

RECORD.

“(2) Subject as in this Act is otherwise provided the pendency of any action, prosecution or proceeding in any other court involving questions of fact shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.

“(3) The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive. R.S.O. 1927, c. 225, s. 44.”

p. 19, l. 17-19. 5. In March, 1928, the Board under the authority of a section in the same terms as section 152 made rules of practice and procedure similar to, and doubtless modelled upon, the rules of practice made under the Judicature Act, including the following rule : 10

“ 17. Ten days after the service of the notice of application on the Respondent orders for production of documents, for inspection, for examinations for discovery, for the examination of witnesses who cannot attend the hearing by reason of sickness or other unavoidable cause, and for the examination of witnesses resident out of Ontario, may be made by the Board, or a member thereof, as the nature of the application may require, and upon such terms as to costs or otherwise as the Board may order or direct.”

pp. 5-6. 6. On the 8th July, 1936 the respondent gave notice of application to the Board for a reduction in the rate for water supplied as provided in the contract, and the appellant amongst other answers alleged that section 2 of the Township of York Act, 1936 is ultra vires of the legislature and that the Board has no jurisdiction under that or any other Act. On the respondents' application for discovery and inspection, the Board made the order which is the subject-matter of this appeal. 20

p. 6, ll. 31-36.
p. 6, ll. 37-39.
p. 8.
pp. 8-9.

pp. 9-10. 7. By its notice of application for leave to appeal from the order to the Court of Appeal the appellant specifically alleged that the members of the Board have no jurisdiction to exercise judicial functions such as the making of the order when they were not appointed by the Governor-General under section 96 of the British North America Act. 30

p. 10, l. 5-9.

8. The relevant provisions of the British North America Act are :

“ 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

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“ 8. Municipal Institutions in the Province.

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“ 13. Property and Civil Rights in the Province. 40

“ 14. The administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial

“ Courts, both of Civil and of Criminal Jurisdiction, and including RECORD.
“ Procedure in Civil Matters in those Courts.
“

“
“ 96. The Governor-General shall appoint the Judges of the
“ Superior, District, and County Courts in each Province, except those
“ of the Courts of Probate in Nova Scotia and New Brunswick.

10 “ 97. Until the Laws relative to Property and Civil Rights in
“ Ontario, Nova Scotia, and New Brunswick, and the Procedure of the
“ Courts in those Provinces, are made uniform, the Judges of the
“ Courts of those Provinces appointed by the Governor-General shall
“ be selected from the respective Bars of those Provinces.
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“ 99. The Judges of the Superior Courts shall hold office during
“ good Behaviour, but shall be removable by the Governor-General
“ on Address of the Senate and House of Commons.

20 “ 100. The Salaries, Allowances, and Pensions of the Judges of
“ the Superior, District, and County Courts (except the Courts of
“ Probate in Nova Scotia and New Brunswick), and of the Admiralty
“ Courts in Cases where the Judges thereof are for the Time being paid
“ by Salary, shall be fixed and provided by the Parliament of Canada.”

9. The Court of Appeal granted leave to appeal and heard argument on p. 12.
the 27th October, 1936 but the Attorney-General of Canada did not then p. 14, l. 17.
appear. On the 4th December, 1936, the Court unanimously dismissed the p. 14.
appeal.

10. In his reasons for judgment the Honourable N. W. Rowell, Chief pp. 15-25.
Justice of Ontario, held the crucial question to be whether the legislature of p. 17, l. 7.
Ontario has power to enact section 2 of the Township of York Act, 1936. p. 17,
The legislature had power to vary the contract between the appellant and ll. 9-16.
30 respondent so as to provide rates fixed by the Board; but section 2 also p. 17,
authorises the Board to settle any differences, including differences of ll. 17-26.
construction relating to or arising out of the contract and to hear and p. 17, l. 27
determine applications. The effect of the British North America Act is p. 18, l. 2.
that both the Dominion and the province must concur in establishing courts p. 18,
of justice. The province creates the courts and the Dominion appoints the ll. 5-34.
judges. The continued success of the system depends on the fundamental p. 18,
principle, recognised by the Judicial Committee of the Privy Council in ll. 35-38.
Martineau against the *City of Montreal* reported in (1932) Appeal Cases 113, p. 18, l. 40-
40 judges of which are appointed by the Governor-General. It is also important p. 19, l. 38.
that the right of the province to create purely administrative tribunals
with all necessary powers should be maintained. After summarising the
powers conferred on the Board, the Chief Justice referred to the difficulty

RECORD.

p. 19, ll. 39-43.
p. 19, l. 43-p. 24,
l. 23.
p. 24, ll. 24-30.
p. 24,
ll. 31-37.
p. 24, l. 38-
p. 25, l. 6.
p. 25,
ll. 7-34.
p. 25, l. 35.

of drawing the line between competent and incompetent provincial legislation and reviewed Canadian and Australian cases and Privy Council appeals therein. These cases show that the province (1) may confer on an administrative tribunal all necessary powers but (2) may not confer power to determine purely judicial questions such as are normally determined by courts of justice. The province may give an administrative tribunal power to construe an agreement when necessary to enable the tribunal to perform its administrative duty, but not power to adjudicate upon questions of construction in the abstract. Therefore the part of section 2 empowering the Board to settle differences as to construction or as to any matters relating to or arising out of the contract is *ultra vires* the legislature of Ontario; but this part is severable from the power to vary or fix the rates to be charged for water supplied. The appeal should therefore be dismissed.

p. 25, l. 38.
p. 25, l. 39-
p. 27, l. 19.

11. The Honourable Mr. Justice Fisher agreed with the Chief Justice and had nothing to add. The Honourable Mr. Justice Riddell was of opinion that nothing in the order goes beyond the powers expressly given to the Board, nor could he detect any usurpation of the powers of a court.

p. 27, l. 20-
p. 30, l. 22.
p. 29,
ll. 12-20.
p. 29, l. 35-
p. 30, l. 4.
p. 30,
ll. 5-14.
p. 30,
ll. 14-18.

12. The Honourable Mr. Justice Middleton stated the facts and contentions, and held that the legislature had power to set aside or vary the contract and to give the Board power to regulate the rates instead of arbitrators. Under a policy of concentrating the determination of purely municipal questions in the Board the Board has been validly endued with great and drastic powers, far greater than ever possessed by any court in that it may disregard agreements legally binding. The power to settle differences between the parties to the contract and as to the construction thereof and other matters relating thereto may be beyond provincial jurisdiction but he did not think the question arises here. All that is sought is a readjustment of rate, which is not a subject-matter properly falling within the jurisdiction of a court. The powers of the Board are, in his opinion, severable and in fixing the rate the Board has all the powers of the rules and has not gone beyond them.

p. 30, l. 23-
p. 31, l. 14.
p. 31,
ll. 4-14.

13. The Honourable Mr. Justice Henderson concurred with the other judges, but thought the Board has no jurisdiction to construe or enforce contracts. The principle which enabled the court to uphold the Board's order was that the order was made in exercise of a statutory power to set aside the contract between the parties and to impose other terms, which no court has jurisdiction to do. The rules of the Board did not appear to provide for entry on and inspection of the appellant's property, but that did not render the order beyond its statutory powers.

14. The Attorney-General of Canada respectfully submits that the Ontario Municipal Board Act, 1932, establishes a superior court and vests it with the jurisdiction and powers of a court; but that the Board cannot lawfully exercise such jurisdiction and powers because, in breach of the British North America Act, the judges are appointed otherwise than by the Governor-General; they need not be selected from the bar of Ontario;

they hold office during pleasure, and their salaries, allowances and pensions are not provided by the Parliament of Canada. The Attorney-General of Canada submits that the inroad on the judicature provisions of the British North America Act is particularly serious because the Board is given power by sections 42 and 43 to exclude and by section 154 to override the jurisdiction of other courts, yet the Board's decisions are by section 156 subject to variation or rescission by the provincial executive; and that these provisions strike "at the root of the means adopted by the framers of the 'British North America Act' to secure the impartiality and the independence of the Provincial Judiciary."

15. The Attorney-General of Canada also respectfully submits that the jurisdiction of the Board cannot be upheld on the ground that it is in the present case exercising a power of revising a contract such as no court possesses. From early times courts of equity, and, by statute, courts of common law, have, for instance, granted relief from penalties and forfeiture, and have protected mortgagors inconsistently with the express terms of their contracts. The Attorney-General of Canada respectfully submits that the conferring on the Board of a specific power not possessed by an existing court in Ontario cannot change the general character of the Act.

16. The Attorney-General of Canada also respectfully submits that the Court of Appeal did not properly apply the principles on which statutory provisions competent to the provincial legislature can be severed from incompetent provisions; and that if these principles had been properly applied the legislation in question would have been held *ultra vires* the legislature of Ontario.

17. The Attorney-General of Canada therefore submits that the decision of the Court of Appeal for Ontario was wrong and should be reversed and that the order of the Board should be set aside for the following amongst other

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REASONS

1. Because the Ontario Municipal Board is a court which, not being properly constituted in accordance with the British North America Act, had no jurisdiction to make the order of the 23rd September, 1936.
2. Because the members of the Board, not having been appointed by the Governor-General, had no jurisdiction to make the order.
3. Because the order was an attempt to exercise judicial powers which the legislature of Ontario could not competently confer on a Board whose members are appointed in the manner and on the terms set out in the Ontario Municipal Board Act, 1932.

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4. Because the Municipal Board Act, 1932 is *ultra vires* the legislature of Ontario.
5. Because section 2 of the Township of York Act, 1936 is *ultra vires* the legislature of Ontario.
6. Because any parts of the Municipal Board Act, 1932 or of section 2 of the Township of York Act, 1936 which, if separately enacted, would have been *intra vires* the legislature of Ontario, cannot be severed from parts which are *ultra vires* the legislature of Ontario.

FRANK GAHAN. 10

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CASE

**OF THE ATTORNEY-GENERAL OF
CANADA.**

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